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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-4154

WESLEY WARD,
Appellant,

v.

STATE OF ILLINOIS,
Appellee.

On Appeal from the Supreme Court for the State of Illinois

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

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The appellant, Wesley Ward, appeals from the judgment and opinion of the Illinois Supreme Court pronounced May 14, 1976, and the denial of appellant's timely petition for rehearing, by the Illinois Supreme Court, on June 28, 1976. This jurisdictional statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are present.

OPINIONS BELOW

The opinion of the Appellate Court for the State of Illinois, Third District, announced on February 20, 1975, is reported at 25 Ill.App.3d 1045, 324 N.E.2d 205 (1975). A copy of the opinion is attached in the appendix as Exhibit A.

The opinion of the Illinois Supreme Court, announced on May 14, 1976, is reported at 63 Ill.2d 437, 349 N.E.2d 47 (1976). A copy of the opinion is included in the appendix as Exhibit B. The order of the Illinois Supreme Court denying appellant's petition for rehearing was entered June 28, 1976, and is included in the appendix as Exhibit C.

JURISDICTION

This action was commenced by the filing of criminal complaints charging the defendant with the crime of obscenity, under Chapter 38, § 11-20, Illinois Revised Statutes. The defendant filed a pre-trial motion to dismiss, as well as motions for judgment at the close of the state's case in chief and at the close of all the evidence, which alleged, inter alia, that the publications which were the subject of the charge, were not obscene as a matter of law, and that Chapter 38, § 11-20 was unconstitutional, affronting constitutional rights afforded him by the First and Fourteenth Amendments to the Constitution of the United States. These motions were all denied. After a bench trial, the Honorable John A. Whitney found the defendant guilty of obscenity on April 4, 1972. The defendant was sentenced to one day in jail and fined the sum of $200 on April 17, 1972. His post-trial motion, again raising the aforementioned constitutional issues, was denied by the trial court on May 23, 1972.

The defendant-appellant appealed to the Illinois Appellate Court, Third District, and his conviction was affirmed. *People v. Ward*, 25 Ill.App.3d 1045, 324 N.E.2d 205 (1975).

The defendant-appellant appealed to the Illinois Supreme Court which rejected his claim that the Illinois Obscenity Statute was vague, indefinite, overbroad and uncertain, in violation of the constitutional rights guaranteed him by the First and Fourteenth Amendments to the Constitution of the United States as enunciated in *Miller v. California*, 413 U.S. 15 (1973). On May 14, 1976, the Illinois Supreme Court affirmed the defendant's conviction in a written opinion. His petition for rehearing was denied on June 28, 1976.

A notice of appeal from the aforesaid opinion and denial of rehearing by the Illinois Supreme Court was filed in the Illinois Supreme Court on August 13, 1976. A copy of the said notice of appeal is included in the Appendix as Exhibit D. Jurisdiction of the United States Supreme Court to review the decision of the Illinois Supreme Court by appeal is conferred by Title 28, United States Code, § 1257 (2). *Cohen v. California*, 403 U.S. 15, 17, 18 (1971), (reh. den. 404 U.S. 876 (1971); *Dahnke-Walker Mining Co. v. Bondurant*, 257 U.S. 282, 287-290 (1921).

QUESTIONS PRESENTED

1. Whether the provisions of the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, on its face and as construed by the Illinois Supreme Court, are vague, indefinite, overbroad and uncertain, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments to the Constitution of the United States.

2. Whether the publications, "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism" are constitutionally protected, as a matter of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the United States Constitution; and the Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, are set forth in the appendix as Exhibit E.

STATEMENT

Appellant was convicted of the offense of obscenity, after a bench trial, in the Circuit Court of Peoria County, Illinois, in April, 1972. Appellant's motions attacking the constitutionality of the Illinois Obscenity Statute and asserting the non-obscenity and protectability of the two publications, "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism" which he was charged with selling, were denied by the trial court. Appellant appealed to the Appellate Court for the State of Illinois, Third District.

At the time of appellant's appeal, the Illinois Supreme Court had rendered its decision in *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691 (1972) (hereinafter referred to as *Ridens I*). While his appeal was pending, *Ridens I* was vacated and remanded for reconsideration in light of *Miller v. California*, 413 U.S. 15 (1973); see *Ridens v. Illinois*, 413 U.S. 912 (1973). The decision in the Appellate Court was further stayed pending reconsideration of the Illinois Obscenity Statute by the Illinois Supreme Court. In *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974) (hereinafter referred to as *Ridens II*), the Illinois Supreme Court held that the Illinois Obscenity Statute was still constitutional. A petition for a writ of certiorari was denied. *Ridens v. Illinois*, 421 U.S. 993 (1975).

The Third District Appellate Court announced its decision in February, 1975, affirming the appellant's conviction. Appellant thereafter sought review by the Illinois Supreme Court by a petition for leave to appeal which was granted in May, 1975. The cause was briefed and oral argument held in the Illinois Supreme Court on March 9, 1976. While the opinion and judgment were pending, a three-judge federal court was convened in the Northern District of Illinois to consider the constitutionality of the Illinois Obscenity Statute in light of the mandate of *Miller v. California*, 413 U.S. 15 (1973), in a cause entitled *Eagle Books, Inc. et al. v. Reinhard, et al.*, — F.Supp. — (three-judge, U.S.D.C., N.D.Ill., W.D., No. 76-C-20014, 5/28/76). (See opinion in appendix as Exhibit F attached) Oral argument in the three-judge case was held the same day the Illinois Supreme Court announced its decision in *People v. Ward*, where the Illinois Supreme Court again upheld the constitutionality of the Illinois Obscenity Statute, stating:

> "In *People v. Ridens*, 51 Ill.2d 410, we affirmed the convictions of defendants who had been found guilty of violating, *inter alia*, the Illinois obscenity statute by selling obscene publications. The United States Supreme Court subsequently remanded that case and directed us to reconsider our decision in light of the principles announced in *Miller* and related decisions. (*Ridens v. Illinois*, 413 U.S. 912, 37 L.Ed.2d 1030, 93 S.Ct. 3046.) This court again affirmed the convictions and found that the Illinois obscenity statute was constitutional. (*People v. Ridens*, 59 Ill.2d 362, *cert. denied*, 421 U.S. 993, 44 L.Ed.2d 483, 95 S. Ct. 2000 (hereinafter referred to as *Ridens* II.) It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity includes within the scope of the 'prurient interest' a 'shameful or morbid interest in nudity, sex or excretion.' The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific

in defining the type of material which will be considered obscene. We see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term 'obscenity' with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objections."

People v. Ward, 63 Ill.2d at 440, 441, 349 N.E.2d at 48, 49.

The Court also held that the publications in issue were not constitutionally protected.

Subsequently, on May 28, 1976, the three-judge federal court held that the Illinois Obscenity Statute was unconstitutional for its failure to meet the specificity requirements of *Miller v. California, supra. Eagle Books et al. v. Reinhard et al.*, — F.Supp. — (three-judge, U.S.D.C., N.D. Ill., W.D., No. 76-C-20014, 5/28/76). That court specifically noted the Illinois Supreme Court's decision in *People v. Ward*, 63 Ill.2d 437, 349 N.E.2d 47 (1976), but, nonetheless, held the statute constitutionally invalid. On July 12, 1976, the Attorney General for the State of Illinois filed a notice of appeal to the United States Supreme Court from the decision of the three-judge court in *Eagle Books*. On August 13, 1976, the appellant, Wesley Ward, filed a notice of appeal to the United States Supreme Court, from the decision of the Illinois Supreme Court. The appellant's sentence of one day in jail and a $200 fine was stayed pending review by the United States Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

The Illinois Obscenity Statute, Chapter 38, § 11-20, Illinois Revised Statutes, under which the appellant was convicted, is unconstitutional because it fails to meet the specificity requirements of *Miller v. California*, 413 U.S. 15 (1973). This in-

validity exists in the statute both as written and as construed by the Illinois Supreme Court in *Ridens II*, 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. den., 421 U.S. 993 (1975). *Eagle Books, Inc., et al. v. Reinhard, et al.*, — F.Supp. — (three-judge, U.S.D.C., W.D. Ill., No. 76-C-20014, 5/28/76). The statute contains no specific definition of sexual conduct, the description or depiction of which, renders material patently offensive and potentially obscene. Illinois has never specifically defined, either in its legislation or by judicial construction, the sexual conduct which may not be depicted or described. Illinois has declined to do so because obscenity, it is held, cannot be defined with "precision."

Constitutional Standards Under Miller v. California

This Court outlined new constitutional standards which must be met in the regulation by states of sexually oriented material in June, 1973, in *Miller v. California*, 413 U.S. 15 (1973). In introducing those standards, the Court stated:

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc. v. Dallas, supra*, at 682-685. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." (footnote omitted)
>
> *Miller v. California*, 413 U.S. 15 at 23, 24.

The Court then pronounced the standards for the determination of obscenity by the trier of fact which were stated to be:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as

a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Miller v. California, 413 U.S. at 24.

To fully appreciate the impact of these new standards, a comparison should be made with the standards existing prior to *Miller*. A tripartite test, labeled the *Roth-Memoirs* standard because of its promulgation from *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), provided that for material to be considered obscene:

"(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Memoirs v. Massachusetts, 383 U.S. at 418.

The *Miller* test represents an effort by the Court to satisfy the constitutional requirements of due process notice in conjunction with the free speech and press provisions of the United States Constitution. This is done by a delineation or listing of explicit sexual conduct in the *Miller* examples to demonstrate that it is "sexual conduct" and not "sexual matters" that are to be proscribed under the tripartite *Miller* test. In those examples under part (b), the Court suggested that a state regulatory statute could define the prohibited sexual conduct as:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Miller v. California, 413 U.S. at 25.

Under this new *Miller* test the Court felt content that "these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." *Miller v. California*, 413 U.S. at 27.

With these new guidelines this Court vacated judgments in some 68 cases, and remanded them to lower courts for reconsideration in light of these new constitutional principles.

Post-Miller Statutory Construction

There were a substantial number of cases involving the construction of state statutes at the time of the decision in *Miller* and its companion cases which were pending before the United States Supreme Court. Those cases on the remand, and other cases in both state and federal courts have been considered in light of *Miller*, with the view that the *Miller* test now provides the constitutional standard for pre-*Miller* statutes.

These post-*Miller* cases concerning pre-*Miller* statutes fall into three basic categories. First, a statute as written may supply the necessary specificity under part (b) of the tripartite test in terms which are consistent with the *Miller* examples. *State v. Liles*, 537 P.2d 1182 (Ore., 1975), cert. den. — U.S. —, 95 S.Ct. 1749 (1976). Second, where a statute as written does not supply the needed specificity, and prior state court decisions provide authority to construe the statute to either adopt the *Miller* examples or to delineate a list of prohibited sexual conduct, the statute may be construed to be constitutional. *Pierce v. State*, 292 Ala. 473, 296 So.2d 218

(1974), cert. den. 419 U.S. 1130 (1975); *Gibbs v. State*, 255 Ark. 997, 504 S.W.2d 719 (1974); *People v. Enskat*, 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (1973), cert. den. 418 U.S. 937 (1975); *Miller v. California*, 418 U.S. 915 (1974); *Bloom v. Municipal Court*, 127 Cal.Rptr. 317, 545 P.2d 229 (1976); *Rhodes v. State*, 283 So.2d 359 (Fla., 1973); *Slaton v. Paris Adult Theatre I*, 231 Ga. 312, 201 S.E.2d 456 (1973), cert. den. 418 U.S. 939 (1974); *State v. A Motion Picture Entitled "The Bet,"* 547 P.2d 760 (Kan. S.Ct., 1976); *Ebert v. Maryland State Board of Censors*, 19 Md.App. 300, 313 A.2d 536 (1973), cert. den. 419 U.S. 1074 (1974); *McNary v. Carlton*, 527 S.W.2d 343 (Mo., 1975); *State v. Little Art Corporation*, 191 Neb. 448, 215 N.W.2d 853 (1974); *State v. Harding*, 114 N.H. 335, 320 A.2d 646 (1974); *People v. Heller*, 33 N.Y.2d 314, 307 N.E.2d 805 (1973); *State v. Bryant*, 285 N.C. 27, 203 S.E.2d 27 (1974), cert. den. 419 U.S. 974 (1974); *State ex rel. Keating v. Vixen*, 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973); *McCrary v. State*, 533 P. 2d 629 (Okla., 1974); *State v. Watkins*, 262 S.C. 178, 203 S.E.2d 429 (1973), app. dismissed 418 U.S. 911 (1974); *West v. State*, 514 S.W.2d 433 (Tex., 1974); *Price v. Commonwealth*, 214 Va. 490, 201 S.E.2d 798 (1974), cert. den. 419 U.S. 902 (1974); *State v. J. R. Distributors, Inc.*, 82 Wash.2d 584, 512 P.2d 1049 (1973), cert. den. 418 U.S. 949 (1974); *State ex rel. Chobot v. Circuit Ct. for Milwaukee County*, 61 Wis.2d 354, 212 N.W.2d 690 (1973).

Third, a state statute may provide no indication for delineation of sexual conduct and prior decisional law may provide no authority for so construing a statute, thereby rendering the statute unconstitutional for vagueness. *People v. Tabron*, 547 P.2d 372 (Col., 1976); *Mohney v. State*, 261 Ind. 58, 300 N.E.2d 66 (1973); *Stroud v. State*, 261 Ind. 56, 300 N.E.2d 100 (1973); *State v. Wedelstedt*, 213 N.W.2d 652 (Ia., 1973); *State v. Shreveport News Agency, Inc.*, 287 So.2d 464 (1973); *State v. McNutt*, 287 So.2d 478 (1973); *Commonwealth v.*

Horton, 310 N.E.2d 316 (Mass., 1974); *People v. Bloss*, 394 Mich. 79, 228 N.W.2d 384 (1975); *State v. Welke*, 298 Minn. 402, 216 N.W.2d 641 (1974); *ABC Interstate Theatres, Inc. v. State*, 325 So.2d 123 (Miss., 1976); *State v. DeSantis*, 65 N.J. 462, 323 A.2d 489 (1974); *McCright v. Olson*, 367 F. Supp. 937 (three-judge court, U.S.D.C., N.D., 1973); *Commonwealth v. McDonald*, 347 A.2d 290 (Pa., 1975); *Commonwealth v. Burak*, 232 P.Super. 499, 335 A.2d 820 (1975).

The necessity for specific delineation in states' obscenity statutes was underscored in *Jenkins v. Georgia*, 418 U.S. 153 (1974). There the United States Supreme Court reversed a jury verdict finding the film "Carnal Knowledge" obscene. Justice Rehnquist, speaking for the court stated that:

> "We . . . took pains in *Miller* to 'give a few plain examples of what a state statute could define for a regulation under part (b) of the standard announced,' that is, the requirement of patent offensiveness. . . . These examples include 'representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,' and 'representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.' . . . While this did not purport to be an exhaustive catalog of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination."
>
> *Jenkins v. Georgia*, 418 U.S. at 160-161.

Thus, it can be said that specificity is the keystone of the *Miller* tripartite test. Indeed, this Court after *Miller* had occasion to construe the federal obscenity statute, Title 18, United States Code, § 1461 et seq., in *Hamling v. United States*, 418 U.S. 87 (1974). In *Hamling*, the Court relied on a prior judicial interpretation of the statute in *United States v. 12,200 Ft. Reels of*

Film, 413 U.S. 123 (1973), and adopted by construction, the two *Miller* examples of patently offensive sexual conduct to bring the federal obscenity statute within the standards of *Miller v. California*, 413 U.S. 15 (1973).

In view of the importance of the specificity requirement under *Miller*, *Jenkins* and *Hamling*, it is submitted that the three categories of cases are proper, acceptable interpretations of the *Miller* standards in relation to pre-*Miller* obscenity statutes. A review of the Illinois Obscenity Statute, through the time of the affirmance of the appellant's conviction, demonstrates that a *Hamling*-type construction has never been placed on the Illinois Obscenity Statute, and with no specificity written into the statute, it is clear that the statute does not fit into any of the categories of cases above, and is plainly unconstitutional. *Eagle Books v. Reinhard*, — F.Supp. — (three-judge, U.S.D.C., N.D., Ill., No. 76-C-20014, 5/28/76). See also, *Rabe v. Washington*, 405 U.S. 313 (1972).

The Illinois Obscenity Statute

The Illinois Supreme Court in *Ridens I*, 51 Ill.2d 410, 282 N.E.2d 691 (1972), construed the Illinois Obscenity Statute to comply with the *Roth-Memoirs* standard. The court specifically included within the Illinois definition of obscenity the third of the tripartite standard that material must be "utterly without redeeming social importance." *Ridens I*, 51 Ill.2d at 414, 282 N.E.2d at 694.

A petition for certiorari was granted by this Court, and the cause was vacated and remanded to the Illinois Supreme Court for consideration in light of *Miller v. California*, *Ridens v. Illinois*, 413 U.S. 912 (1973).

On the remand, the Illinois Supreme Court was faced with the same construction problems that have been noted in the

categories of cases discussed ante. The Court had to consider whether the statute as written met the part (b) specificity mandated by *Miller*, whether prior Illinois decisions provided authority for a judicial construction of the statute to provide the needed specificity, or whether the statute was unconstitutional. In *Ridens II*, 59 Ill.2d 362, 321 N.E.2d 264 (1974), the Illinois Supreme Court failed to place the Illinois Obscenity Statute within any of the three accepted categories of post-*Miller* decisions.

In *Ridens II*, when confronted with the *Miller* construction problems, although paying lip service to *Miller*, the Illinois Supreme Court failed to provide the *Miller*-mandated specificity that was lacking in the statute. The court held the statute constitutional in spite of vagueness and overbreadth attacks, by relying on *Grayned v. City of Rockford*, 408 U.S. 104 (1972), (an anti-noise ordinance held constitutional) and *People v. Raby*, 40 Ill.2d 392, 240 N.E.2d 595 (1968), (disorderly conduct statute held constitutional).

In an analytical dissent, Justice Davis specifically addressed the construction questions presented by *Miller*. Justice Davis concluded that the statute as written did not provide specificity and past Illinois cases could not be authority for any judicial construction; therefore, a legislative response was needed. In short, the statute was unconstitutional. *Ridens II*, 59 Ill.2d at 375-389, 321 N.E.2d at 271-278. It should be noted that Justice Davis was the author of the opinion in *Ridens I* which construed the Illinois Obscenity Statute to bring it within the *Roth-Memoirs* standards.

After *Ridens II*, and prior to appellant's case, the Illinois Supreme Court had two additional opportunities in which to address itself to the *Miller* issues. In *People v. Hume, Inc.*, 60 Ill.2d 397, 327 N.E.2d 329 (1975) and *People v. Gould*, 60 Ill.2d 159, 324 N.E.2d 412 (1975), the court reaffirmed

its ruling in *Ridens II*. With this background the appellant Ward specifically asked the court to address itself to the *Miller* construction issues.

In the opinion below, the Illinois Supreme Court again reaffirmed *Ridens II*, rejecting any possible construction of the statute to give it specificity. The court held that obscenity cannot be defined with "precision" and affirmed the appellant's conviction. In doing so, the Illinois Supreme Court has failed to address the very issue upon which the multitude of state obscenity cases have turned, that is, specificity. Obscenity may not be able to be defined with "precision" but it can nonetheless be defined in accordance with *Miller v. California*. By failing to give the statute just such a definition or to declare the statute unconstitutional, and failing to give the appellant the benefit of any saving construction, the Illinois Supreme Court has committed constitutional error in appellant's case.

The identical analysis and argument concerning the role of the Illinois Supreme Court and the Illinois Obscenity Statute was presented and adopted by a three-judge federal court, after *People v. Ward*, 63 Ill.2d 437, 349 N.E.2d 47 (1976), on May 28, 1976, in *Eagle Books, Inc. v. Reinhard*, . . . F.Supp. . . . (three-judge, U.S.D.C., N.D.Ill, 5/28/76). Indeed, that court concluded:

> "This court does not believe *Miller* can be properly construed as allowing the actual language of Section 11-20 to be specific without the judicial engrafting of *Miller*-type examples, or other specifications such as those articulated in Justice Davis's dissent in *Ridens II*. As no such specification has been supplied by the Illinois Supreme Court, this court holds that Section 11-20, as construed, is constitutionlly invalid."
>
> *Eagle Books, Inc. v. Reinhard*, . . . F. Supp. . . . (Three-judge, U.S.D.C., N.D.Ill., 5/28/76) (A-26).

That court concluded that the Illinois Obscenity Statute was unconstitutional. The Attorney General of the State of Illinois has filed a notice of appeal to the United States Supreme Court from that three-judge decision. It is submitted that the decision of that three-judge court is correct and that appellant's appeal should be granted, and on authority of *Eagle Books v. Reinhard*, his conviction be reversed. Proper appeal jurisdiction, pursuant to 28 U.S.C., § 1257 (2), is present in the case because the Illinois Supreme Court, the highest state court in Illinois, in answering appellant's constitutional attacks on the Illinois Obscenity Statute, has ruled in favor of the validity of the statute.

Obscenity of the Material

The United States Supreme Court has determined that it is required to make an independent judicial review to determine whether or not the material is constitutionally protected. *Jenkins v. Georgia*, 418 U.S. 153 (1974). In this case the appellant has asked the Clerk of the Illinois Supreme Court to certify the publications under which he was convicted, "Bizarre World" and "Illustrated Case Histories: A Study of Sado-Masochism."

Under the standards of *Miller v. California*, only hard core sexually explicit material can be the subject of state regulation. *Miller v. California*, 413 U.S. at 27 (1973). *Miller* equates "hard core" with materials which contain patently offensive representations of "ultimate sexual acts, masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California*, 401 U.S. at 25. A review of the publications in issue in this case will demonstrate that they are entitled to constitutional protection. Therefore, it was error for the Illinois Supreme Court to conclude, on independent judicial review, that the materials were obscene.

These materials should be found constitutionally protected and appellant's conviction should be reversed.

CONCLUSION

It is submitted that the decision of the Illinois Supreme Court below, has resulted in the deprivation of appellant's life without due process of law and in violation of the free speech and press provisions of the First and Fourteenth Amendments. A DIRECT CONFLICT EXISTS BETWEEN THE DECISION OF THE FEDERAL THREE-JUDGE COURT IN *EAGLE BOOKS* AND THE ILLINOIS SUPREME COURT IN *WARD*. The existence of the statute in its present form undermines the rights of other individuals similarly situated with appellant. Appellant submits that the questions for review are substantial and of great public importance.

Respectfully submitted,

DONALD M. RENO, JR.

J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY
501 West Church
Champaign, Illinois 61820
Attorneys for Appellant

APPENDIX

EXHIBIT A

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, *v.* WESLEY WARD, Defendant-Appellant

(No. 72-200; Judgment affirmed)

Third District—February 20, 1975

* * * * * * *

APPEAL from the Circuit Court of Peoria County; the Hon. JOHN A. WHITNEY, Judge, presiding.

Reno, O'Byrne & Kepley, of Champaign (Donald M. Reno, Jr., of counsel), for appellant.

Michael Mihm, State's Attorney, of Peoria (Thomas M. Pennell, Assistant State's Attorney, of counsel), for the People.

Mr. JUSTICE STOUDER delivered the opinion of the court:

This is an appeal from the judgment of the circuit court of Peoria County finding defendant, Wesley Ward, guilty of violating section 11-20(a)(1) of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 11-20(a)(1)) by selling two obscene publications. Defendant waived a jury and after bench trial was found guilty and sentenced to 1 day in jail and fined $200. The only witness for the State was the complaining police officer who testified he purchased the two publications, "Bizarre World" and "Illustrated Case Histories, a Study of Sado-Masochism," at defendant's store. The police officer's testimony and the magazines themselves were the sole evidence presented by the State. Defendant presented no evidence, and after his motion for judgment was denied, judgment was entered against the defendant.

There are three principal issues on this appeal. The resolution on each of these is governed by the case of *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691, which was granted certiorari by the United States Supreme Court in 413 U.S. 912, 37 L.Ed.2d 1030, 93 S.Ct. 3046. The Supreme Court vacated the judgment and remanded the case to the Illinois Supreme Court, 59 Ill.2d 362, which affirmed the convictions of the defendant. The United States Supreme Court, in vacating and remanding the initial decision in the *Ridens* case, directed the Illinois Supreme Court to reconsider the case in light of the holdings of the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, and other related cases decided by the Court at the same time. After reconsideration of the *Ridens* case the Illinois Supreme Court reaffirmed the defendant's conviction and concluded that the Illinois obscenity statute (Ill. Rev. Stat. 1969, ch. 38, par. 11-20) complied with the standards announced in the United States Supreme Court cases.

1. The first issue is whether the State's evidence consisting of magazines made up almost exclusively of photographs constituted sufficient proof to establish violation of the obscenity statute and, therefore, whether the failure to present opinion testimony as to contemporary community standards was fatal to the State's case. The Illinois Supreme Court in *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691, held that such opinion testimony was not required. The court there held that the publications themselves constituted sufficient evidence to support defendant's conviction for violating the statute.

2. The second issue is whether it was necessary for the State to prove either the sale to minors or the intrusion upon the privacy of unwilling adults in order to convict defendant of violating the statute by selling the magazines. The court in *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691, held that defendant's claim that the obscenity ordinance and code were

deficient because they did not require proof that the offending publications were sold to minors or intruded upon the privacy of unwilling adults was without merit. In accord with this case, we hold here that it was not necessary for the State to prove either the sale to minors or the intrusion upon the privacy of unwilling adults.

3. The final issue on this appeal is whether the two publications were obscene as a matter of law. Again, the case of *People v. Ridens*, 51 Ill.2d 410, 282 N.E.2d 691, is dispositive of the issue in the case at bar. The magazines in this case do not differ in any substantial sense from the magazines described in *Ridens*, and they fall within that category prohibited by the statute. See also *People v. Gould*, 60 Ill.2d 159.

For the foregoing reasons the judgment of the circuit court of Peoria County is affirmed.

Judgment affirmed.

DIXON, J., and SCOTT, P. J., concur.

EXHIBIT B

(No. 47479.—Judgment affirmed.)

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,
v. WESLEY WARD, Appellant.

Opinion filed May 14, 1976.—Rehearing denied June 28, 1976.

* * * * * * *

Appeal from the Circuit Court of Peoria County; the Hon. John A. Whitney, Judge, presiding.

Donald M. Reno, Jr., and J. Steven Beckett, of Reno, O'Byrne & Kepley, of Champaign, for appellant.

William J. Scott, Attorney General, of Springfield, and Michael M. Mihm, State's Attorney, of Peoria (Jayne A. Carr and Raymond McKoski, Assistant Attorneys General, of counsel), for the People.

MR. JUSTICE CREBS delivered the opinion of the court:

The defendant was convicted of the offense of obscenity after a bench trial in the circuit court of Peoria County. The court ruled that the defendant, the operator of a book store, had violated section 11—20(a)(1) of the Criminal Code of 1961 (Ill. Rev. Stat. 1971, ch. 38, par. 11—20(a)(1)) by selling two obscene publications. The defendant was sentenced to spend one day in the county jail and was fined $200 and costs.

The defendant presented no evidence in his own behalf at trial but did file a motion for a directed verdict at the close of the State's case. After this motion was denied and a judgment of conviction was entered, the defendant filed a post-trial motion in which he alleged, *inter alia*, that the obscenity statute

was unconstitutional and that the magazines in question were constitutionally protected. The post-trial motion was denied, and the defendant's conviction was subsequently affirmed. (*People v. Ward*, 25 Ill. App. 3d 1045.) We have granted defendant's petition for leave to appeal to this court.

The defendant first contends that the Illinois obscenity statute is unconstitutional in that it does not specifically define the type of sexual conduct that may not be depicted. The defendant relies on the case of *Miller v. California*, 413 U.S. 15, 37 L.Ed. 2d 419, 93 S. Ct. 2607, in which the United States Supreme Court announced new criteria to be used in judging the constitutionality of obscenity statutes. The court determined that the three questions to be considered in such a case are: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citations]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." The Supreme Court stated that the conduct whose depiction is proscribed by obscenity statutes must be "specifically defined by the applicable state law, as written or authoritatively construed." 413 U.S. 15, 24, 37 L. Ed. 2d 419, 430-31, 93 S. Ct. 2607, 2615.

The Illinois obscenity statute states in pertinent part:

"(a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, pic-

ture, record or other representation or embodiment of the obscene;

* * * * * * *

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs." (Ill. Rev. Stat. 1971, ch. 38, par. 11-20.)

The defendant now argues that the statute does not sufficiently define the type of conduct whose depiction is proscribed.

In *People v. Ridens*, 51 Ill.2d 410, we affirmed the convictions of defendants who had been found guilty of violating, *inter alia*, the Illinois obscenity statute by selling obscene publications. The United States Supreme Court subsequently remanded that case and directed us to reconsider our decision in light of the principles announced in *Miller* and related decisions. (*Ridens v. Illinois*, 413 U.S. 912, 37 L. Ed. 2d 1030, 93 S. Ct. 3046.) This court again affirmed the convictions and found that the Illinois obscenity statute was constitutional. (*People v. Ridens*, 59 Ill.2d 362, *cert. denied*, 421 U.S. 993, 44 L. Ed. 2d 483, 95 S. Ct. 2000 (hereinafter referred to as Ridens II).) It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity includes within the scope of the "prurient interest" a "shameful or morbid interest in nudity, sex or excretion." The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material

which will be considered obscene. We see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term "obscenity" with a fine degree of precision. We again express our opinion that Illinois' statutory definition is sufficiently clear to withstand constitutional objections.

The defendant also contends that the obscenity statute is unconstitutional as applied to him because the State elicited no evidence suggesting that the publications in question were forced upon unwilling audiences or made available to juveniles. The defendant argues that the statute cannot be constitutionally applied to cases in which the sexually explicit materials are sold or distributed only to consenting adults. This argument is based on the allegation that contemporary community standards are not offended unless the obscene materials are forced upon unwilling audiences or made available to minors.

The defendant's argument is without merit. Contemporary community standards are relevant in determining whether a publication is obscene but bear no relevance to the questions of how or to whom obscene materials may be distributed. If a publication is determined to be obscene, it is not entitled to constitutional protection. (*Miller v. California*, 413 U.S. 15, 23, 37 L. Ed. 2d 419, 430, 93 S. Ct. 2607, 2614.) The Illinois General Assembly chose to make the commercial distribution of obscene materials a crime. This was within the police power of the State. The sale of obscene publications is a violation of the criminal law, therefore, even if the publications are not forced upon unwilling audences or made available to minors.

The final contention made by the defendant is that the two publications are not obscene and thus are entitled to protection under the first amendment to the United States Constitution and article I, section 4, of the Illinois Constitution. In obscenity cases, a reviewing court must make an independent constitutional judgment on the facts of the case as to whether the ma-

terial involved is constitutionally protected. (*People v. Ridens*, 59 Ill.2d 362.) After reviewing the publications at issue in this case, we have no hesitation in affirming the holding of the lower courts that the materials are in fact obscene. We find that the average person applying contemporary community standards would consider that, taken as a whole, the sole appeal of the two publications is to the prurient interest and that the dominant theme of the magazines is a morbid interest in nudity and sex. Moreover, we regard the publications as depicting, in a patently offensive way, sexual conduct defined by the obscenity statute, as authoritatively construed in Ridens II. In addition, the magazines go substantially beyond customary limits of candor in such depiction. We also find that the magazines have no literal or artistic merit and that they are utterly without redeeming social value. For the foregoing reasons we hold that the two publications are obscene, and the judgment of the appellate court is affirmed.

Judgment affirmed.

EXHIBIT C

State of Illinois
Office of
Clerk of the Supreme Court
Springfield
62706

Clell L. Woods
Clerk

Telephone
Area Code 217
782-2035

June 28, 1976

Mr. J. Steven Beckett
Reno, O'Byrne & Kepley
Attorneys at Law
501 West Church Street
Champaign, Illinois 61820

No. 47479—People State of Illinois, appellee, v. Wesley Ward, appellant. Appeal, Appellate Court, Third District

You are hereby notified that the Supreme Court today denied the petition for rehearing in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

EXHIBIT D

General No. 47479

In the
SUPREME COURT
of the
STATE OF ILLINOIS

People of the State of Illinois, Plaintiff-Appellee, v. Wesley Ward, Defendant-Appellant.	Appeal from the Circuit Court of Peoria County Honorable John A. Whitney, Judge Presiding Appeal from the Appellate Court of the State of Illinois, Third District

NOTICE OF APPEAL

Notice is hereby given that Wesley Ward, defendant-appellant in the above captioned-cause, appeals to the Supreme Court of the United States from an opinion dated May 14, 1976, entered by the Supreme Court of the State of Illinois, and from the order of the said Supreme Court of the State of Illinois, dated June 28, 1976, denying the Petition for Rehearing filed by the defendant-appellant. Said opinion of the Illinois Supreme Court upheld the constitutionality of Illinois Revised Statutes (1976), Chapter 38, § 11-20, and held certain materials unprotected by the Constitution of the United States,

which materials the defendant was convicted of distributing. Defendant-appellant takes this appeal pursuant to 28 U.S.C. 1257 (2).

Respectfully submitted,

J. Steven Beckett
Reno, O'Byrne & Kepley
501 West Church
Champaign, Illinois 61820
Attorney for Defendant-Appellant

EXHIBIT E

First Amendment Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

Fourteenth Amendment Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 38—Criminal Law and Procedure 38 § 11-21

11-20. § 11-20. **Obscenity.)** (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal,

such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or absence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

EXHIBIT F

United States District Court
Northern District of Illinois
Western Division

Eagle Books, Inc., a Delaware Corporation, George Robert Hobbs, James E. Talkington, Jacqueline D. Davis, Shawnee Elmore, Robert Gosney, Michael Milazzo, Ira Jerry Ferrell, and David J. Foss,
Plaintiffs,

v.

Philip Reinhard, Individually and in His Capacity as State's Attorney of Winnebago County, Illinois, and Delbert Peterson, Individually and in His Capacity as Chief of Police of the City of Rockford, Illinois,
Defendants.

76 C 20014.

Before Cummings, Circuit Judge, and Will and Flaum, District Judges.

Memorandum Opinion

Flaum, District Judge. Plaintiffs are employees of bookstores and the corporate owner of those bookstores. They bring this suit to declare 38 Ill. Rev. Stats. §11-20 unconstitutional, and to enjoin defendant Philip Reinhard, State's Attorney of Winnebago County, Illinois, and defendant Delbert Peterson, Chief of Police of the City of Rockford, Illinois, from enforcing the

statute. Retrospective relief for prior activities carried out in connection with enforcement is also sought. Because of the injunctive nature of the relief requested against a state statute, a three judge court was requested under 28 U.S.C. § 2281. The substantiality of the federal question presented was discussed in a memorandum opinion issued by the single judge, issued April 15, 1976, which concluded with the convening of the present three judge court. In addition to the verified complaint, and the attached exhibits, representations of fact have been made through plaintiffs' Voluntary Bill of Particulars, motions and accompanying exhibits by both defendants for dismissal or summary judgment, and during oral argument held on May 14, 1976 before the three judge court. These sources are sufficient to dispose of this case. For the reasons which follow, prospective injunctive and declaratory relief will be granted with respect to the corporate defendant, and the suit will be dismissed with regard to the individual defendants without prejudice.

Facts

Plaintiff Eagle Books, Inc. ("Eagle Books") owns two bookstores in the City of Rockford, "The Adult Book and Cinema", and the "Hollywood Art Store". Individual plaintiffs were employed as salespersons in these stores. In a series of searches at least in part authorized by search warrants signed by state judges, Rockford police appeared at the Eagle Book stores on February 27, March 1, and March 3, 1976. They seized the films named in the warrants, as well as the film projectors that carried them, monies, business records, a cash register, safe, brief case, and other items. Another search was made on March 11. The warrants were limited to films, and were based on complaints signed by police officers characterizing the conduct portrayed in the movies and giving the opinion of the officers that the movies were obscene. In the course of these searches,

the individual plaintiffs were arrested under 38 Ill. Rev. Stats. § 11-20 for the selling of "obscene" materials. On March 5, two more employees of the bookstores were arrested on the same ground. They were subsequently added as plaintiffs in this lawsuit. In the course of the searches, seizures and arrests, the bookstores cannot operate, and temporarily cease business. It is uncontested that the bookstores sell, in addition to items which were seized as obscene, communicative material which is not obscene. (See defendant Peterson's Motion To Dismiss Or In The Alternative For Summary Judgment, at p. 6; Transcript of Oral Argument at p. 37).

Subsequent to the seizures of items from the bookstores, attempts were made by plaintiffs' attorneys to retrieve those items which were not specified in the warrant. For reasons not entirely clear to this court, plaintiffs' attorney felt obligated to refuse return of at least some of the items unless the State's Attorney would stipulate that those items had been seized in violation of the law. Such a stipulation was never offered, and the items have all, consequently, been retained. (See Tr. of Oral Argument at pp. 17-19).

An important ingredient of plaintiffs' allegations is the prospect that the procedure for obtaining warrants to seize "obscene" movies is unconstitutional in that it gives rise to confiscation of communicative materials without adequate provision for a hearing or for supervision by a magistrate or other judicial officer. However, alternative search procedures have since been exclusively utilized by the defendants as part of an agreement which obviated the need for a ruling by this court on plaintiffs' motion for a temporary restraining order. Defendants have not, however, conceded that their original procedure is unconstitutional.

Justiciability

Law enforcement officers intended to prosecute violations of Section 11-20. (See exhibit DD of "Exhibits For Defendant Reinhard's Motion To Dismiss Or For Summary Judgment"; Defendant Peterson's Motion To Dismiss, Or, In The Alternative For Summary Judgment At p. 6). Taken together with the number and nature of searches carried out on Eagle Books' premises prior to the filing of the complaint, this circumstance leads the court to find that the prospect of future enforcement of Section 11-20 in such a fashion as will disrupt the operations or deprive of materials the Adult Book and Cinema and the Hollywood Art Store is sufficiently immediate to give rise to a case or controversy under Article III of the Constitution. *Steffel v. Thompson*, 415 U.S. 452, 260 (1974).

Constitutionality of Section 11-20

The plaintiffs' challenge to the constitutionality of Section 11-20 revolves around the requirements set forth in *Miller v. California*, 413 U.S. 15 (1973). The circumstances under which *Miller* arose and the logical consequences of its holding and judgment merit examination to determine what it mandates state courts to do.

The *Miller* standards fall in two categories, a tripartite definition, and a requirement of specificity. The first category was described as follows:

> "The basic guidelines for the trier of fact must be (a) whether 'the average person, applying contemporary standards' would find that the work taken as a whole appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, *sexual, conduct specifically defined by the applicable state law;* and (c) whether the work, taken as a whole, lacks serious literary,

artistic, political or scientific value." Id. at p. 24-25 (citations omitted, emphasis added).

The second category is an elaboration of the specificity requirement alluded to in (b), above. *Miller* did not, however, set standards with its explanation of specificity; it merely gave examples of what would be sufficiently specific:

> "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:
>
> > "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
> >
> > "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Id. at p. 25.

It can be seen from these examples that mere "sexual conduct" is not specific enough to give adequate notice of what is being regulated as obscene, but with the addition of "the ultimate sexual act", it would be. Similarly, it can be seen that through the use of such examples, "excretory functions" can be incorporated into the "sexual conduct" of the (b) of the tripartite standard.

The tripartite standard of *Miller* was an embellishment on a tripartite standard then in use, originally promulgated in *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). The so-called *Roth-Memoirs* standard was that material could be regulated as obscene if:

> ". . . (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it confronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Memoirs v. Massachusetts, supra*, at p. 418, cited in *Miller v. California, supra*, at p. 21.

A comparison of the two tripartite standards must take into account the facts confronting the *Miller* Court. A defendant had been convicted for knowingly distributing obscene matter, under the California Penal Code, § 311.2(a). The jury had been "instructed that, in determining whether the 'dominant theme of the material, taken as a whole . . . appeals to the prurient interest' and in determining whether the material 'goes beyond the customary limits of candor and affronts contemporary community standards of decency' it was to apply 'contemporary community standards of the State of California' instead of the national community standards." *Miller v. California*, 423 U.S. at p. 31. The court found these deviations from the prevailing view that a national standard should have been used did not give rise to a constitutional error. Thus, as far as the defendant was concerned, no complaint could be had as to the shift between the (a) and (b) of the respective standards, except for the specificity requirement alluded to in part (b) of the *Miller* tripartite standard. Conviction under part (c) of the *Memoirs* standard similarly could have no prejudice to one arguing for part (c) of *Miller*, for material utterly without redeeming social value, as that term had been defined, would a fortiori lack serious artistic, literary, political, or scientific value. It thus appears from this comparison that the greatest difference in obscenity law, so far as the defendant in *Miller* was concerned, was the specificity requirement, a requirement never formalized in *Miller*, but only exemplified. This appears to be the sole, if not the most important explanation for the judgment of *Miller*, which was to remand the case back to the California state appellate court.

Further importance of the specificity requirement, in terms of the remand, appears from the nature of the material which the defendant was convicted of distributing:

> "While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed." Id. at p. 19.

This material is more than coincidentally covered by the suggested specifying examples of *Miller*. If the specificity requirement were surplusage, no remand should have been necessary at all.

Cases after *Miller v. California* reasserted the importance of the specificity requirement, and even read in the *Miller* examples to constitutionally construe a federal statute. *Hamling v. United States*, 418 U.S. 87 (1974). Similarly, the Court reserved for state court construction the specificity of statutes comparable to Section 11-20 in *Miller* itself, and in the companion case of *Paris v. Adult Theatres I v. Slayton*, 413 U.S. 49 (1973). The relation of the specificity requirement to First Amendment protections was underscored again in *Jenkins v. Georgia*, 418 U.S. 153 (1974), in which Mr. Justice Rhenquist, speaking for a majority of the Court, held that the film Carnal Knowledge could not, constitutionally, be treated as obscene:

> "We . . . took pains in Miller to 'give a few plain examples of what a state could define for regulation under part (b) of the standard announced,' that is the requirement of patent offensiveness . . . While this did not purport to be an exhaustive catalogue of what juries might find patently offensive, it was certainly intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination. It would be wholly at odds with this aspect of Miller

> to uphold an obscenity conviction based on a defendant's depiction of a woman with a bare midriff, even though a properly charged jury unanimously agreed on a verdict of guilty." (Id. at pp. 160-1.) (Citations omitted). (Emphasis added).

In the context of the importance in *Miller* attached to specificity, the recent litigation concerning Section 11-20 must be reviewed. Section 11-20, in pertinent part, reads

> "(b) Obscene Defined.
>
> A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in the description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs." 38 Ill. Rev. Stats. §11-20.

No further definition of obscenity is contained in the statute or incorporated by reference. Prior to *Miller*, the Illinois Supreme Court found this definition to be constitutional, in an opinion authored by Justice Davis. *People v. Ridens*, 51 Ill. 2d 410, 282 N.E. 2d 691 (1972) (hereafter referred to as *"Ridens I"*). Subsequently, the United States Supreme Court granted certiorari, vacated the judgment, and remanded the cause for consideration in light of *Miller*. On remand, *People v. Ridens*, 59 Ill. 2d 362, 321 N.E. 2d 264 (1974) (*"Ridens II"*), the Illinois Supreme Court said:

> "We need not and do not attempt to analyze the changes from the three part Roth-Memoirs standard effected by the enunciation of the three part Miller standard. It suffices to, and we now construe section 11-20 of the Criminal Code to incorporate parts (a) and (b) of the Miller standard." 321 N.E. 2d 270.

The context of the quotation clearly indicates that the (a) and (b) referred to are of the tripartite scheme, rather than the two examples, a shortcoming which was pointed out by Justice Davis, who was now the lone dissenter. 321 N.E. 2d 276.[1]

An incorporation of the *Miller* tripartite standard cannot alone satisfy *Miller's* specificity requirement. *Miller* explicitly reserved for the states the specification itself. Not every state will seek to regulate all, or even the same subset of that material which can be constitutionally treated as obscene. Indeed, the Supreme Court of the United States expressly avoided demanding the use of its particular examples as a standard or proposed regulatory scheme. *Ridens II* might have explicitly included the *Miller* examples as its own, by construction, as did the Supreme Court in *Hamling*, but *Ridens II* did not. It remained after *Ridens II* for Section 11-20 to be amended either legislatively or by state judicial construction to supply the wanting specificity so that the nature of the possible obscene materials being regulated, and their distinction from protected materials, could be adequately defined. *That definition is as essential to law enforcement officials who are charged with carraying out the law, as it is to juries* like the one in *Jenkins v. Georgia*, who must apply the law to a set of facts.

On the three occasions in which the Illinois Supreme Court had to construe Section 11-20, it chose not to supply the needed specificity. In *People v. Gould*, 60 Ill. 2d 159, 324 N.E. 2d 412 (1975), the tripartite *Miller* standard, and the two possible examples were quoted, just as they were in *Ridens II*. Reference was made to *Ridens II* for the incorporation of the

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[1] Where the state court has supplied examples by construction, the specificity problem may be cured. See Miller v. California, 418 U.S. 915 (1974) (appeal dismissed for want of substantial federal question); accord, People v. Nissinoff, 43 Cal. App. 3d 1025, 118 Cal. Rptr. 457 (1975); People v. Enskat, 33 Cal. App. 3d 900, 908-10, 109 Cal. Reptr. 433, 438-39 (1973), cert. denied, 418 U.S. 937 (1974).

Miller tripartite standard, and Justice Davis, dissenting, incorporated by reference his prior dissent in *Ridens II*. In *People v. Hume*, 60 Ill. 2d 397, 327 N.E. 2d 329 (1975), specificity was not explicitly dealt with. Finally, in an unanimous[2] opinion filed the very day that oral argument was heard in this case, the Illinois Supreme Court clearly stated that no further specifying judicial construction of Section 11-20 is forthcoming:

> "The defendant now argues that the statute [§11-20] does not sufficiently define the type of conduct whose depiction is proscribed.
>
> "In People v. Ridens, 51 Ill. 2d 410 [Ridens I], we affirmed the convictions of defendants who had been found guilty of violating, *inter alia*, the Illinois obscenity statute by selling obscene publications. The United States Supreme Court subsequently remanded that case and directed to us to reconsider our decision in light of the principles announced in *Miller* and related decisions. (*Ridens v. Illinois*, 413 U.S. 912, 37 L.Ed. 2d 1030, 93 S.Ct. 1046.) This court again affirmed the convictions and found that the Illinois obscenity statute was constitutional. (People v. Ridens, 59 Ill. 2d 362 [Ridens II], *cert. denied*, 421 U.S. 993, 44 L.Ed. 2d 483, 95 S.Ct. 2000 (hereinafter referred to as Ridens II). It was held in Ridens II that the obscenity statute was sufficiently clear and that it adequately informed the public of the conduct whose depiction is proscribed. We noted that the statutory definition of obscenity statutes includes within the scope of the 'prurient interest' a 'shameful or morbid interest in nudity, sex, or excretion.' The defendant argues that we erred in Ridens II in our interpretation of *Miller* and that *Miller* requires obscenity statutes to be much more specific in defining the type of material which will be considered obscene. We

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[2] The late Justice Davis had previously ceased to sit on the Illinois Supreme Court.

see no reason to reconsider our decision in Ridens II. It is extremely difficult to define the term 'obscenity' with a fine degree of precision. *We again express our opinion* that Illinois statutory definition is sufficiently clear to withstand constitutional objections." People v. Ward, No. 47479, slip op. at p. 2 (Ill. Sup.Ct., filed May 14, 1976). (Emphasis added) (Explanation supplied).

The similarity between Section 11-20, and the California statute which was the subject of the *Miller* remand is inescapable:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes beyond the customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." Miller v. California; 413 U.S. 15, 17, 18, n.1 (1973).

This court does not believe *Miller* can be properly construed as allowing the actual language of Section 11-20 to be specific without the judicial engrafting of *Miller*-type examples, or other specifications such as those articulated in Justice Davis's dissent in *Ridens II*. As no such specification has been supplied by the Illinois Supreme Court, this court holds that Section 11-20, as construed, is constitutionally invalid.

Is Equitable Relief Appropriate on Behalf of the Individual Plaintiffs?

Defendants contend that under *Younger v. Harris*, 401 U.S. 37 (1971), the equitable relief requested by plaintiffs is barred by considerations of comity. As to all the individual plaintiffs, there is currently a pending criminal proceeding in the

Illinois state courts. Federal interference with those proceedings can be justified only if it can be shown that the proceedings are the product of bad faith on the part of law enforcement officials, or that other extraordinary circumstances exist.

The gravamen of bad faith prosecutions is the lack of a reasonable expectation that valid convictions will result. Section 11-20 has been repeatedly upheld by the Illinois Supreme Court. Good faith enforcement of such a statute cannot give rise to a bad faith prosecution. The complaint, as elucidated and limited by the Voluntary Bill of Particulars (see section I, "Facts Upon Which the Assertion of Official Bad Faith and Harassment Are Based") relies on: (1) the procedure to obtain warrants which authorize seizure of movies; (2) the seizure of items beyond the scope of a search warrant; (3) delay in filing charges based on material seized until after the commencement of the present lawsuit; (4) refusal to stipulate that items seized beyond the scope of the search warrants were illegally seized; (5) the use of allegedly illegally seized items for investigative purposes; (6) the filing of felony charges and request for felony bail bond for arrests under Section 11-20, whose violation is a misdemeanor; (7) failure to take into custody some persons who were arrested in the course of searches; and (8) statements made by defendants and their agents.

The relation of these assertions to bad faith harassment is attenuated since the adoption of alternative procedures by defendants appears to have avoided any recurrence. The statements attributed to defendants, or their alleged agents, are entirely consistent with good faith prosecution, albeit somewhat vigorous. Prosecutors have discretion to enforce state laws to the limit of their resources. No bad motive is attributable to the decision to enforce Section 11-20. Seizures beyond the scope of the warrant are generally unconstitutional, and defendants have not contended (with the exception of film projectors) that any justification exists for those seizures. Only the corporate defendant has rights with respect to these seizures, however.

The initial filing of felony charges and the request for felony bail bond on a Section 11-20 misdemeanor charge is the most promising candidate to support an ultimate finding of bad faith. It is, however, an isolated occurrence. The improprieties allegedly committed, with this one exception, are either wholly consistent with good faith prosecution, or else readily redressible in the proceedings which are now pending, insofar as the individual plaintiffs are concerned. These items may nonetheless have probative value toward establishing bad faith if future events supplement them. While the court does not implicitedly condone all of the practices alleged to have been carried out by defendants and their agents, we hold that the complaint, including the bill of particulars, does not make out a claim for the bad faith harassment exception as to the individual plaintiffs and that consequently, the complaint must be dismissed as to the individual plaintiffs for failure to state a claim on which relief can be granted.

The Property of Equitable Relief for Eagle Books

Having found that 38 Ill. Rev. Stats. § 11-20 is unconstitutional as construed, for failure to incorporate specific examples of obscenity, or to otherwise satisfy the specificity requirements of *Miller v. California, supra,* it remains for the court to consider what, if any, relief should be fashioned for Eagle Books, in light of this court's holding that no equitable relief is appropriate as to the individual plaintiffs. The comity considerations of *Younger v. Harris, supra,* however, ordinarily apply only when there is a pending criminal proceeding against the very plaintiff who seeks relief in federal court. Otherwise, declaratory and injunctive relief may be given on traditional grounds. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Steffel v. Thompson*, 415 U.S. 452 (1974). In this particular case, the court must engage in an analysis similar to one suited for determination of the existence of bad faith/extraordinary cir-

cumstances, in order to determine whether the corporate plaintiff, Eagle Books, should be treated for purposes of fashioning relief as though there in fact were a pending criminal proceeding against it.

Doran v. Salem Inc., supra, acknowledged the question of separating, for purposes of fashioning relief, plaintiffs in one lawsuit according to whether or not each had a pending criminal proceeding. Three corporations in a single town each operated bars. At those bars, they employed women with uncovered breasts. The town enacted an ordinance which made such employment a sufficient condition for the imposition of criminal punishment against the corporations in the form of a fine. On the effective date of the ordinance, the corporation ceased the practice, but jointly filed a complaint in federal district court to have the ordinance declared unconstitutional and to have its enforcement enjoined. The complaint requested a temporary restraining order which was denied. Subsequent to the denial, one of the three corporations temporarily resumed the practice, and became the subject of a criminal prosecution in the state court. In holding that each plaintiff must be treated separately, the court said:

> "We do not agree . . . that all three plaintiffs should automatically be thrown into the same hopper for Younger purposes and should thereby each be entitled to injunctive relief. We cannot accept that view, any more than we can accept petitioner's equally Procrustean view that because [plaintiff] M & L would have been barred from injunctive relief had it been the sole plaintiff, [plaintiffs] Salem and Tim-Rob should likewise be barred not only from injunctive relief but declaratory relief as well. *While there plainly may be some circumstances in which the legally distinct parties are so closely related that they should all be subject to the Younger considerations which govern any one of them, this is not*

> *such a case*—while respondents [plaintiffs] are represented by common counsel, and have similar business activities and problems, they are apparently unrelated in terms of ownership, control and management. We thus think that each of the individual respondents should be placed in the position required by our cases as if that respondent stood alone." Id. at pp. 928-9. (Explanation supplied.) (Emphasis added.)

It is apparent from this statement that the *Younger* considerations themselves are intertwined with the distinction between parties. The closer the relationship between parties, the more likely it is that the comity policies underlying *Younger* will be disrupted by federal equitable relief with respect to one when a pending criminal proceeding exists with respect to the other. In the present case, the nexus between Eagle Books and its plaintiff-employees is too substantial to allow for the categorical exclusion of consideration of comity allowed in *Steffel* and *Doran, supra*. Similarly, the differences in the interests of the corporate and the individual defendant are too substantial to utilize the same bad faith/extraordinary circumstances criteria as would apply if a pending criminal proceeding existed with respect to Eagle Books. Although no specific exception is arrived at, the court holds that under the circumstances of this case, declaratory and injunctive relief is appropriate on behalf of Eagle Books.

Eagle Books has interests in the enforcement and validity of Section 11-20 that do not equally pertain to its plaintiff-employees. First and foremost, Eagle Books operates bookstores at which, it has been conceded, communicative materials which are not obscene are kept and sold. The arrests, searches, and seizures all do great injury to Eagle Books' dissemination of these First Amendment materials. The bookstores must be closed down when arrests are made. Patrons are chilled from exercising their First Amendment rights by the presence of on-

going police procedures at the source of materials. And patrons of course have no access to these protected materials during the periods when the stores are closed. Moreover, the seizure of materials and cessation of protected activity give rise to a day to day pecuniary loss to Eagle Books, much of which cannot be calculated. Also, Eagle Books is subject to prosecution under Section 11-20. See 38 Ill. Rev. Stats. § 2-15. The decision not to so prosecute is presumably an exercise of that same prosecutorial discretion by which some employees might be arrested, but not others.

In contrast, the interest of the persons arrested is much more limited to the particular arrest. There is no allegation that they partake of their employer's loss of income. They have no institutional role as book and film dispensers. They do have an interest in being able to carry out their present employment, which appears to subject them to repeated risk of prosecution.

Perhaps the most important reason why these differences in interests do not, by themselves, justify separate treatment is what Eagle Books has *not* done, namely it has not refrained from activity which could give rise to prosecution under an arguably unconstitutional law for the purpose of testing it in federal court, as was the case of the plaintiffs who secured relief in *Steffel* and *Doran*. Eagle Books was the employer, and in a relevant sense the controller of its employees, who did violate that law. Eagle Books, therefore, has some vicarious involvement with the pending prosecutions, and it is therefore necessary to review the policies that support *Younger*.

Given the above conclusion, the court must now decide whether the circumstances of this case nonetheless justify, in terms of comity and federalism, equitable relief. Historically, federal courts have been unwilling to interfere with the state criminal system. In *Ex Parte Young*, 209 U.S. 123, 161-62 (1908), equitable relief was sanctioned against an attorney

general who enforced a state criminal law (by seeking a writ of mandamus) which had been found to carry so heavy a fine that citizens and corporations might be unwilling to challenge it for fear of being subject to the penalty for even one violation. In *Fenner v. Boykin*, 271 U.S. 240 (1926), the Supreme Court affirmed the denial of an injunction against the enforcement of a criminal statute:

> "The accused should first set up and rely upon his defense in the state courts even though this involves a challenge to the validity of some statute, unless, it appears that this course would not afford adequate protection." Id. at p. 244.

The injunction of state prosecutions was reserved for situations in which the "danger of irreparable loss is both great and immediate." Id. at p. 243. These cases turn on whether or not the available state court proceeding afforded a reasonable way to challenge the allegedly unconstitutional statutes.

The boundaries of restraint of federal equitable relief against state prosecutions were further delineated in *Douglas v. City of Jeannette*, 319 U.S. 157 (1943), in which the Supreme Court affirmed the reversal of an injunction against prosecuting under a statute which the Supreme Court that very day had declared unconstitutional. The rationale was that

> "It does not appear from the record that petitioners have been threatened with any injury other than that incident to every criminal proceeding brought lawfully and in good faith, or that *a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court.*" Id. at p. 164 (Emphasis added). Accord., Cameron v. Johnson, 390 U.S. 611, 620 (1968).

The nexus between good faith prosecutions and lack of irreparable injury sufficient for intervention was articulated in

Dombrowski v. Pfister, 380 U.S. 479 (1965). Prosecutions, arrests, searches and seizures had been allegedly undertaken, nominally pursuant to the Louisiana Subversive Activities and Communist Control Law, and the Communist Propaganda Control Law, with no expectation of valid convictions. Moreover, the items seized were allegedly used to harass those engaged in particular First Amendment activities. The Court held that the complaint stated a basis for equitable relief, even though there existed a pending prosecution against plaintiffs. The basis did not arise, however, from the prospect of mistake by the prosecutor.

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this court and that the mere possibility of erroneous initial application of constitutional standards will not usually amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." Id. at pp. 484-485.

It can be seen from these cases that the bad faith exception is treated as a special class (and the only class the Supreme Court has recently viewed) of the cases in which the state proceeding is peculiarly inadequate to vindicate rights guaranteed by the federal constitution. Drawing from the facts in *Dombrowski v. Pfister*, there are a number of reasons why bad faith prosecutions are such appropriate occasions for an exception to the general rule against federal interference.

First of all, where there is no expectation of a valid conviction, proceeding through the state system, and even the Supreme Court, will not stop the launching of another arrest or law suit. The pending proceeding only offers retrospective relief and is by definition unlikely to deter the unscrupulous law enforcement agent from future transgressions. Additionally, the consequences of the arrestee's entry into the state criminal justice system may be more honorous than usual, given the expectation of bad faith. Arrests may be attended with undue publicity,

for example, as was the case in *Dombrowski*, thereby resulting in an undue impairment of the First Amendment rights of the plaintiffs. More generally, the incidents to a good faith criminal prosecution are enhanced because systematic safeguards against their unjustified initiation, such as the prerequisite of probable cause for an arrest, can not be depended on. The entire social context of bad faith prosecutions must also be considered. A community, comprised mainly of those who are not the explicit victims of bad faith prosecutions, may change its behavior, particularly First Amendment exercise, because of the rash of arrests, even if those improperly motivated arrests are professionally executed, and even if no misuse of the fruits is involved. Finally, the extent of prosecutorial power is so great that its abuse[3] may have serious effect before a state proceeding ends.

The bad faith exception is harmonious with the *Younger v. Harris* recitation of a "national policy forbidding federal courts to stay or enjoin state court proceedings except under special circumstances" 401 U.S. at p. 41 (footnote omitted), with

> ". . . a sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States" Id. at p. 44,

and with a proper respect for state functions. However, matters which are quite capable of causing great and immediate irreparable harm are not always addressed in the pending state proceeding. Federal intervention in those instances cannot be characterized as a disregard for the competence of state court judges,

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[3] Where a statute itself is flagrantly unconstitutional, the same presumption of irreparability may overcome the ordinary deference to state proceedings, even though there is no reason why the state proceedings might not quickly and competently address federal constitutional claims. Younger v. Harris, 401 U.S. 37, 53-5 (1971).

or as a disregard for the overwhelming expectation that they will carry out their oaths to support the federal constitution. *See Huffman v. Pursue*, 420 U.S. 592, 611 (1975). Indeed, the bad faith exception is a recognition that where great and immediate irreparable harm will flow from continued prosecutions, and where the pending state court proceedings do not, by their nature, anticipate the injuries being done, federal courts must fulfill their role as the guarantors of the federal constitutional rights and must fashion appropriate relief. By definition, the injuries which inhere in a good faith prosecution are contemplated by the state court criminal proceeding. Also, where a different kind of state proceeding is involved, federal intervention might not be called for. *See Llewelyn v. Oakland County Prosecutor's Office*, 402 F.Supp. 1379, 1391 (E.D. Mich. 1975).

Given this context, we proceed to examine the facts before us to determine if the irreparability posed by the continued enforcement of Section 11-20 approaches that which has been associated with bad faith. In considering the following factors, it should be borne in mind that conditions which, by themselves, may not be sufficient to give rise to irreparable harm justifying intervention, may nonetheless be relevant to the ultimate assessment of whether the total situation presented to the court is sufficient to determine the question before it in favor of granting equitable relief. First Amendment interests are at stake in this lawsuit. The prospect of continued enforcement seriously interferes with the distribution of communicative materials. It is uncontested that defendants intend to vigorously enforce the statute. While such vigor is in no way tantamount to bad faith, it does indicate that the ability to continue the First Amendment activity may be increasingly, immediately and unjustifiably threatened.

In the ordinary situation, this court would give very careful deference to the prospect that the constitutional issue could be

raised before the state trial court. However, no real meaningful opportunity exists for such an issue to be raised there. As discussed earlier in this opinion, the Illinois Supreme Court has had four occasions in less than three years to review the very constitutional question raised by plaintiffs, the last occasion being on the same day that oral argument was held in this cause. Through those cases, that court has repeatedly indicated that it will not give any further specification of Section 11-20 through the judicial construction contemplated by *Miller v. California*, 411 U.S. 415 (1973). State trial courts are bound by their state Supreme Court, especially where the state Supreme Court has construed a ruling by the United States Supreme Court. Consequently, in light of the *People v. Ward, supra*, announcement that Section 11-20 is constitutionally specific, no Illinois trial court can be expected to give further consideration of the issue. Therefore, given the particular First Amendment aspects of this matter it is evident that a federal court, by precluding some part of this matter from the state court's consideration, gives petitioner Eagle Books protection it could not secure through a prompt trial and ultimate appeal to the Supreme Court. *Cf. Douglas v. City of Jeannette, supra*, at p. 164.

What confronts plaintiff Eagle Books is not that its chances of success on appeal are "inauspicious". *Huffman v. Pursue, supra*, at p. 1211, or that there exists the "mere possibility of erroneous initial application of constitutional law", *Dombrowski v. Pfister, supra*, at p. 485, but rather that there is no meaningful opportunity at all to raise its issue, which we find more than substantial, before the state court system if it were to be prosecuted.

The attack on this statute is in essence facial, although it includes not only the words written by the legislature, but also those engrafted by the Illinois Supreme Court. Because the same statute, as construed, applies to all state citizens who may engage in the First Amendment activity carried out by Eagle

Books and its counterparts, the federal interest is heightened. *Steffel v. Thompson*, 415 U.S. 452, 474 (1974). In addition we find the unconstitutionality of Section 11-20 invokes the prospect of the presumption of irreparability that would attend a flagrantly unconstitutional statute. While we do not find patent unconstitutionality to be encrusted on every part of the statute, it is noteworthy that, despite the directions of the remand of the original *Ridens* case, and despite the emphasis in *Miller* on specificity, the state has not explicitly confronted the specificity question either legislatively or judicially. The obviousness of the need for a specifying construction of Section 11-20 under *Miller* enhances the irreparability attendant to the lack of a meaningful opportunity to obtain proper construction through the state court system.

Aside from the factors of irreparability, the present case at the same time contains ingredients which soften ordinarily harsh impact on state-federal relations that attends federal intervention. The state court system has carefully considered the constitutional question raised by plaintiffs, and we respect the process by which they have achieved their result. The intervention of this court does not cast in a negative light the competence or fairness of state court judges; rather, once the state court has reflectively performed that function, no purpose, under present circumstances, is served by delaying federal consideration of the same issue through a three step process of trial, appeal, and subsequent appeal (by leave) to the Illinois Supreme Court. Moreover, the nature of the relief granted today by the court does not directly encumber any ongoing prosecution. *Cf. Hicks v. Miranda*, 420 U.S. 920 (1975).

Conclusion

There is no present criminal proceeding pending against plaintiff Eagle Books. It is therefore, unnecessary to decide whether the present circumstances give rise to the same level of

irreparability as is associated with a bad faith prosecution or "extraordinary" circumstances. We do find, however, that Eagle Books has shown, without contest, serious irreparable injury in the face of threatened enforcement of the statute which entails seizures of its materials and arrests of its employees. In view of the current state law, declaratory relief by itself would not seem to be adequate, *Cf. Ex Parte Young, supra*, since law enforcement persons have a duty to enforce Section 11-20. Accordingly, the court hereby declares that Section 11-20 is violative of the Fourteenth Amendment of the Constitution, and that defendants are hereafter enjoined from enforcing Section 11-20 as presently construed, on the premises of the two bookstores owned by Eagle Books and from prosecuting Eagle Books for violation of Section 11-20. Particularly, future arrests and seizures of materials pursuant to the present Section 11-20 can no longer be authorized or carried out with respect to those premises.

ENTER:

/s/ WALTER J. CUMMINGS
Judge
United States Court of Appeals

/s/ HUBERT L. WILL
Judge
United States District Court

/s/ JOEL M. FLAUM
Judge
United States District Court

DATED: May 28, 1976